

FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA

In re ) Case No. 11-31221-E-13  
 )  
ANTHONY NORMAN LANDRY and )  
TERESA MARIE LANDRY, )  
 )  
Debtors. )  
 )  
 )  
ANTHONY NORMAN LANDRY and ) Adv. Pro. No. 12-2675  
TERESA MARIE LANDRY, ) Docket Control No. DBR-1  
 )  
Plaintiffs, )  
v. )  
 )  
BANK OF AMERICA, N.A. and )  
U.S. BANK, N.A., )  
 )  
Defendants. )  
 )

MEMORANDUM OPINION AND DECISION

Defendants Bank of America, N.A. ("BANA") and U.S. Bank, N.A., as Trustee for Certificate holders of LXS 2007-16N Trust Fund ("U.S. Bank") (collectively "Defendants") seek to dismiss the Third Cause of Action (violation of the automatic stay) and Fourth Cause of Action (violation of California Rosenthal Fair Debt Collection Practices Act) in this Adversary Proceeding. It is asserted that the Complaint does not state claims upon which relief can be

1 granted. Fed. R. Civ. P. 12(b)(6) and Fed. R. Bankr. P. 7012.

2 **BACKGROUND OF BANKRUPTCY CASE**

3 Plaintiffs Anthony Landry and Teresa Landry ("Plaintiffs")  
4 filed their Chapter 13 petition on May 4, 2011. The court  
5 confirmed the Plaintiffs' Amended Chapter 13 Plan on October 4,  
6 2011.<sup>1</sup> The Amended Chapter 13 Plan provides for the payment of the  
7 Class 1 Secured Claim of BAC Home Loan Servicing ("Class 1  
8 Claim").<sup>2</sup> The Class 1 Claim is identified as secured by the real  
9 property commonly known as 7730 Meadowlark Lane, Sheridan,  
10 California. The post-petition monthly mortgage payments of  
11 \$2,200.75 (or as adjusted pursuant to the underlying contract for  
12 the debt) for this claim are provided to be paid in the confirmed  
13 Amended Chapter 13 Plan.

14 On November 23, 2012, Plaintiffs filed this Adversary  
15 Proceeding against Defendants. The Complaint alleges that on  
16 July 10, 2012, Defendants filed a Notice of Mortgage Payment  
17 Change<sup>3</sup> making demand on the Chapter 13 Trustee to increase the  
18 post-petition monthly mortgage payments on the Class 1 Claim to  
19 \$3,399.22 a month (principal and interest in the amount of  
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21 <sup>1</sup> First Amended Plan, Bankr. E.D. Cal. No. 11-31221  
22 ("Plaintiff's Bankruptcy Case"), Dckt. 15.

23 <sup>2</sup> BANA is the successor of BAC Home Loans Servicing, LP by  
24 merger. Certificate of Merger from the Office of the Secretary of  
25 State, State of Texas, dated June 28, 2011, effective July 1, 2011,  
26 Document No. 374034630002, provided to the court by Bank of America,  
27 N.A. in connection with other unrelated proceedings. Proof of Claim  
28 Number 1 filed in Plaintiffs' Bankruptcy Case states that U.S. Bank,  
N.A., Trustee is the creditor and that payments are to be sent to BAC  
Home Loans Servicing, LP for this for the Class 1 Claim as provided in  
the Plaintiff's Chapter 13 Plan.

<sup>3</sup> Bankr. E.D. Cal. No. 11-31221, July 10, 2012 Docket Entry (no  
docket number).

1 \$2,987.44, plus impounds of \$411.72). The demand for the increased  
2 payment was effective August 1, 2012.

3 Two of the six causes of action stated by Plaintiffs in the  
4 Complaint are at issue in this Motion. The Third Cause of Action  
5 asserts that the filing and service on the Chapter 13 Trustee of  
6 the Notice of Mortgage Payment Change seeking payment of the higher  
7 amount constituted a violation of the Automatic Stay. The Fourth  
8 Cause of Action asserts that the filing and service of the Notice  
9 of Mortgage Payment Change constitute a violation of the Rosenthal  
10 Fair Debt Collection Practices Act, California Civil Code § 1788 et  
11 seq. ("Rosenthal Act").

12 **MOTION TO DISMISS**

13 A motion to dismiss must state with particularity the grounds  
14 upon which the requested relief is based (Fed. R. Civ. P. 7(b),  
15 Fed. R. Bankr. P. 7007). For the Third Cause of Action (violation  
16 of the automatic stay), the grounds stated are that the Complaint  
17 fails to allege facts which demonstrate a violation of the  
18 automatic stay because a Notice of Payment Change, as permitted  
19 under the Chapter 13 Plan and Federal Rules of Bankruptcy  
20 Procedure, provided by Defendants does not constitute a violation  
21 of the Automatic Stay. Further, the Complaint fails to allege any  
22 conduct of the Defendants which is asserted to have threatened,  
23 harassed, or coerced Plaintiffs.

24 To the extent that the Third Cause of Action asserts a claim  
25 couched as abuse of process, Defendants state that the Complaint  
26 fails to allege any use of the court's process in an improper way  
27 by the Defendants. Additionally, the Complaint fails to allege any  
28 improper actions by Defendants in attempting to enforce its lien as

1 part of a claim for abuse of process.

2 For the Fourth Cause of Action, it is asserted that Defendants  
3 are not "debt collectors" as defined by the Rosenthal Act.  
4 Further, it asserts that any allegations that Defendants are debt  
5 collectors under the Rosenthal Act are conclusory. Finally, that  
6 the Complaint fails to allege that Defendants are debt collectors  
7 under the Federal Fair Debt Collection Practices Act, 15 U.S.C.  
8 §§ 1692 *et seq.* ("FDCPA").

9 Plaintiffs oppose the Motion, asserting that the Complaint  
10 sufficiently states plausible claims against the Defendants and  
11 that the pleadings conform to the liberal pleading requirements.  
12 Plaintiffs assert that Defendants have continued to collect monies  
13 from the Estate (payments from the Chapter 13 Trustee) in excess of  
14 the amount which they are entitled for the post-petition mortgage  
15 payment in violation of the automatic stay.

16 Plaintiffs also contend that they have sufficiently pled that  
17 Defendants are debt collectors under the Rosenthal Act, citing the  
18 court to paragraphs 72-78 of the Complaint. Plaintiffs direct the  
19 court to consider the ruling in *McGrew v. Countrywide Home Loans,*  
20 *Inc.*,<sup>4</sup> in response to the two decisions on the issue presented by  
21 Defendants in the Memorandum of Points and Authorities filed with  
22 the Motion to Dismiss.

### 23 **Standard of Review for a Rule 12(b) Motion to Dismiss**

24 In considering a motion to dismiss, the court starts with the  
25 basic premise that the law favors disputes being decided on their  
26 merits. A complaint should not be dismissed unless it appears  
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28 <sup>4</sup> 628 F. Supp. 2d 1237 (S.D. Cal. 2009).

beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to the relief.<sup>5</sup> "[A] plaintiff's obligation to provide 'grounds' of his 'entitle[ment]' to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."<sup>6</sup> Any doubt with respect to whether a motion to dismiss is to be granted should be resolved in favor of the pleader.<sup>7</sup> For purposes of determining the propriety of a dismissal before trial, allegations in the complaint are taken as true.<sup>8</sup>

Federal Rule of Civil Procedure 8 and Federal Rule of Bankruptcy Procedure 7008 require that complaints contain a short, plain statement of the claim showing entitlement to relief and a demand for the relief requested.<sup>9</sup> Factual allegations must be enough to raise a right to relief above the speculative level.<sup>10</sup> All allegations of fact by the party opposing the motion are accepted as true and are construed in the light most favorable to that party.<sup>11</sup> As the Supreme Court recently interpreted and applied Federal Rule of Civil Procedure 12(b)(6), a plaintiff cannot "plead

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<sup>5</sup> *Williams v. Gorton*, 529 F.2d 668, 672 (9th Cir. 1976).

<sup>6</sup> *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

<sup>7</sup> *Pond v. General Electric Co.*, 256 F.2d 824, 826-27 (9th Cir. 1958).

<sup>8</sup> *Kossick v. United Fruit Co.*, 365 U.S. 731, 731 (1961).

<sup>9</sup> Fed. R. Civ. P. 8(a).

<sup>10</sup> *Id.*, citing to 5 C. WRIGHT & A. MILLER, FED. PRACTICE AND PROCEDURE § 1216, at 235-36 (3d ed. 2004) ("[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action").

<sup>11</sup> *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 810 (9th Cir. 1988).

1 the bare elements of his cause of action, affix the label 'general  
2 allegation,' and expect his complaint to survive a motion to  
3 dismiss."<sup>12</sup>

4 In ruling on a 12(b)(6) motion to dismiss, the Court may  
5 consider "allegations contained in the pleadings, exhibits attached  
6 to the complaint, and matters properly subject to judicial  
7 notice."<sup>13</sup> The court need not accept unreasonable inferences or  
8 conclusory deductions of fact cast in the form of factual  
9 allegations.<sup>14</sup> Nor is the court required to "accept legal  
10 conclusions cast in the form of factual allegations if those  
11 conclusions cannot be reasonably drawn from the facts alleged."<sup>15</sup>

12  
13 **THE THIRD CAUSE OF ACTION FAILS TO STATE A CLAIM  
FOR VIOLATION OF THE AUTOMATIC STAY OR ABUSE OF PROCESS**

14 As the Amended Complaint fails to set forth sufficient matters  
15 to establish plausible grounds for a claim based on an alleged  
16 violation of the Automatic Stay, the Motion is granted as to the  
17 Third Cause of Action. Even if all of the allegations set forth  
18 against Defendants in the Complaint are accepted as true, the third  
19 cause of action fails as a matter of law.

20 Federal Rule of Bankruptcy Procedure 3002.1, added by the  
21 2011 Amendments and effective December 1, 2011, provides a  
22 procedure for notice to be provided by a creditor for mortgage  
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24 <sup>12</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 687 (2009).

25 <sup>13</sup> *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007).

26 <sup>14</sup> *Spewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir.  
27 2001).

28 <sup>15</sup> *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir.  
1994).

1 payment changes during a Chapter 13 case. This rule applies in  
2 Chapter 13 cases to claims that are secured by a security interest  
3 in the debtor's principal residence and are provided for under  
4 section 1322(b)(5) of the Code in the debtor's plan.<sup>16</sup> As a noted  
5 bankruptcy treatise posits, compliance with the notice provision of  
6 the rule should eliminate any concern on the part of the holder of  
7 the claim that informing a debtor of a change in post-petition  
8 payment obligations might violate the automatic stay.<sup>17</sup>

9 In the Plaintiffs' bankruptcy case, Defendants assert a claim  
10 secured by a first deed of trust on real property located at  
11 7330 Meadowlark Lane, Sheridan, California. This is the  
12 Plaintiffs' principal residence. Defendants' claim is provided for  
13 in Class 1 of the Plaintiffs' Amended Chapter 13 Plan, which  
14 includes curing a pre-petition arrearage in the amount of  
15 \$31,000.00.<sup>18</sup> Therefore, Defendants are qualified to avail  
16 themselves of Federal Rule of Bankruptcy Procedure 3002.1 and file  
17 and serve a Notice of Payment Change on Debtor, Debtor's counsel,  
18 and the Chapter 13 Trustee of any change in the payment amount,  
19 including any change that results from an interest rate or escrow  
20 account adjustment.<sup>19</sup> The Notice filed by Defendants on July 10,  
21 2012, states the monthly post-petition mortgage payment is  
22 \$3,399.22 a month, effective August 1, 2012. It discloses that  
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24 <sup>16</sup> Fed. R. Bankr. P. 3002.1(a).

25 <sup>17</sup> 9 COLLIER ON BANKRUPTCY ¶ App. 3002.1 (Alan N. Resnick & Henry J.  
26 Sommer eds. 16th ed.).

27 <sup>18</sup> Bankr. E.D. Cal. No. 11-31221, Amended Chapter 13 Plan, Dckt.  
28 15.

<sup>19</sup> Fed. R. Bankr. P. 3002.1(b).

1 there is an increase in the escrow account from \$0.01 to \$411.79.  
2 No other change in the post-petition monthly mortgage payment is  
3 stated.<sup>20</sup> The attachment to the Notice identifies a monthly escrow  
4 amount increase of \$227.00 for county taxes. An additional \$147.00  
5 is added for a projected shortage for the period of August 2012  
6 through July 2013, for the amount necessary to provide for the  
7 escrow account not to have a negative balance. The escrow account  
8 begins with a negative (\$4,593.94) as of August 2012. Page 10 of  
9 the Notice indicates that the Plaintiffs failed to make escrow  
10 payments for taxes in the months of June, July, August, September,  
11 October, November and December 2011, and January, February, March,  
12 April, and May 2012. The ending escrow balance is shown to be a  
13 negative (\$4,593.18).

14 Plaintiffs assert that Defendants complying with the  
15 Bankruptcy Rules and giving notice of a mortgage payment change,  
16 thereby providing Plaintiffs with advance notice and an opportunity  
17 to object to Defendants' computation of the post-petition mortgage  
18 payment, violates the automatic stay. This is an unsustainable  
19 assertion. Compliance with the law in this context to give the  
20 Notice of Mortgage Payment Change is not simultaneously a violation  
21 of the law.

22 Further, as this court has explained in an unrelated case,  
23 "creditors and debtors are allowed to communicate their disparate  
24 positions and rights they seek to assert. It is only when coercion  
25 or harassment is coupled with the communication that they can be in  
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28 <sup>20</sup> Bankr. E.D. Cal. No. 11-31221, Notice of Mortgage Payment  
Change, No Dckt. No. Provided, filed July 10, 2012.



1 violation of the automatic stay."<sup>21</sup> The Ninth Circuit Court of  
2 Appeals clearly addressed this situation in *Morgan Guaranty Trust*  
3 *Company of New York v. American Savings and Loan Association*,<sup>22</sup>  
4 holding that mere request for payment and informational statement  
5 are permissible communications which do not violate the automatic  
6 stay.

7 Because the automatic stay seeks to ensure the orderly  
8 administration of a debtor's estate, provide a breathing spell for  
9 the debtor, maintain the status quo, and prevent harassment of a  
10 debtor and bankruptcy estate by the more sophisticated creditors,  
11 a request for payment (as with the presentment of a negotiable  
12 instrument) does not violate the automatic stay unless it is  
13 accompanied by coercion or harassment, such as immediately or  
14 potentially threatening the debtor's possession of property.  
15 Examples of communications cited by the Ninth Circuit as violating  
16 the automatic stay included: (1) notice of intent to terminate  
17 lease, (2) notice of intent to terminate franchise, (3) notice of  
18 medical clinic refusal to provide future medical services because  
19 of refusal to pay for prior services, (4) letter informing debtor  
20 that an attorney had been hired to collect a delinquent account,  
21 (5) college refusing to release transcripts as a method to force  
22 payment, and (6) a creditor who made repeated visits and telephone  
23 calls to a debtor.<sup>23</sup>

24 Examples of communications not violating the automatic stay  
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26 <sup>21</sup> *Singh v. U.S. Bank (In re Singh)*, 457 B.R. 790, 801 (Bankr.  
27 E.D. Cal. 2011).

28 <sup>22</sup> 804 F.2d 1487, 1491 (9th Cir. 1986).

<sup>23</sup> *Id.*

1 included: (1) letter sent to debtor's attorney that a credit union  
2 would not have further business dealings with the debtor unless  
3 debt was reaffirmed, and (2) communications setting out the basis  
4 of the claim (informal proof of claim).<sup>24</sup>

5 In this Adversary Proceeding, Plaintiffs do not allege any  
6 coercion or harassment coupled with the Notice of Mortgage Payment  
7 Change filed by Defendants. Plaintiffs contend that the violation  
8 of the automatic stay was the act of filing the Notice of Mortgage  
9 Payment Change on or about July 10, 2012, in which Defendants seek  
10 "more than the amount due under the contract."<sup>25</sup>

11 Plaintiffs' contentions are further diminished by their own  
12 Amended Chapter 13 Plan confirmed by this Court on October 26,  
13 2011. The Amended Chapter 13 Plan, Section 3.10(d), provides that  
14 the automatic stay (to the extent it would apply) is modified to  
15 allow the Defendants to send notices concerning changes of interest  
16 rate on variable interest rate loans.<sup>26</sup>

17 Furthermore, Plaintiffs fail to allege any factual or legal  
18 grounds in which the Defendants used the court's process as an  
19 improper way of attempting to enforce the lien. The California  
20 Supreme Court addressed what constitutes abuse of process in  
21 *Rusheen v. Cohen*,<sup>27</sup>

22 The common law tort of abuse of process arises when one  
23 uses the court's process for a purpose other than that

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24 <sup>24</sup> *Id.*

25 <sup>25</sup> Compl. ¶ 46, Dckt. 1.

26 <sup>26</sup> Bankr. E.D. Cal. No. 11-31221, Amended Chapter 13 Plan, Dckt.  
27 15; See also Civil Minute Order Confirming Amended Chapter 13 Plan,  
28 Dckt. 48.

<sup>27</sup> 37 Cal. 4th 1048, 1056-1057 (2006).

1 for which the process was designed. (5 Witkin, Summary of  
2 Cal. Law (9th ed. 1988) Torts, § 459, p. 547; see also  
3 *Kappel v. Bartlett* (1988) 200 Cal. App. 3d 1457, 1463.)  
4 It has been "interpreted broadly to encompass the entire  
range of 'procedures' incident to litigation." (*Barquis*  
*v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 104,  
fn. 4 (*Barquis*).)

5 "[T]he essence of the tort [is] ... misuse of the power of  
6 the court; it is an act done in the name of the court and  
under its authority for the purpose of perpetrating an  
7 injustice." (*Meadows v. Bakersfield S. & L. Assn.* (1967)  
250 Cal. App. 2d 749, 753.) To succeed in an action for  
8 abuse of process, a litigant must establish that the  
defendant (1) contemplated an ulterior motive in using  
9 the process, and (2) committed a willful act in the use  
of the process not proper in the regular conduct of the  
10 proceedings. (*Oren Royal Oaks Venture v. Greenberg,*  
*Bernhard, Weiss & Karma, Inc.* (1986) 42 Cal.3d 1157, 1168  
(*Oren Royal Oaks Venture*).)

11  
12 The alleged demand by Defendants in the Notice of Mortgage  
13 Payment Change does not rise to abuse of process. Defendants are  
14 merely asserting what they believe is the proper amount owed and  
15 are providing notice through the Notice of Mortgage Payment Change.  
16 There are no allegations in the Complaint that the power of the  
17 court has been improperly used. While it is true that if the  
18 Plaintiffs elected not to object to the amount in the Notice of  
19 Payment Change, under the confirmed Chapter 13 Plan the Trustee  
20 would then begin making payments at the higher amount. If the  
21 Plaintiffs failed to increase their plan payments, the Chapter 13  
22 Trustee would then file a motion to dismiss the Chapter 13 case.  
23 The Plaintiffs, as any other person, have ready access to the  
24 courts and may contest a position or rights asserted by any  
25 creditor in the bankruptcy case. Merely because Plaintiffs  
26 disagree with Defendants' computation of a mortgage payment change  
27 does not result in this Notice creating a state law claim for abuse  
28 of process.

1 The Plaintiffs have failed to present the court with any  
2 plausible claim for violation of the automatic stay. The court  
3 grants the Defendants' Motion to Dismiss on the third cause of  
4 action for failure to state a claim for which relief can be  
5 granted.

6 **PLAINTIFFS SUFFICIENTLY ALLEGE THAT DEFENDANTS ARE**  
7 **DEBT COLLECTORS UNDER THE ROSENTHAL ACT IN THE**  
8 **FOURTH CAUSE OF ACTION**

9 In the Motion to Dismiss, Defendants assert that the Complaint  
10 fails to set forth sufficient factual matters to establish  
11 plausible grounds that Defendants are "debt collectors" as that  
12 term is defined under the Rosenthal Act and the FDCPA. Beginning  
13 with the later contention, Defendants are correct, Plaintiffs do  
14 not allege that Defendants are debt collectors under the FDCPA.  
15 The Fourth Cause of Action is clear that relief is sought only  
16 under the Rosenthal Act.

17 The Complaint alleges the following concerning the  
18 relationship between Defendants and the Plaintiffs as relevant to  
19 this issue:

- 20 A. Plaintiffs have a debt (loan) they owe to U.S. Bank, N.A.  
21 Compl. ¶ 11.
- 22 B. Bank of America, N.A. claims that Plaintiffs owe Bank of  
23 America, N.A. money. Compl. ¶ 8.
- 24 C. U.S. Bank, N.A. claims that Plaintiff owe U.S. Bank, N.A.  
25 money. Compl. ¶ 10.
- 26 D. Bank of America, N.A. services the debt Plaintiff's owe  
27 to U.S. Bank, N.A. Compl. ¶ 11.
- 28 E. The debt owed to U.S. Bank, N.A. is secured by real  
property commonly known as 7330 Meadowlark Lane,  
Sheridan, California. Compl. ¶ 11, Proof of Claim No. 1  
filed by Defendants.
- F. Bank of America, N.A. and U.S. Bank, N.A. have  
miscomputed the amount owed for monthly installments on

the debt. Compl. ¶¶ 18, 19.

G. Bank of America, N.A. and U.S. Bank, N.A. have demanded payment of monthly installments in an amount greater than owed by the Plaintiffs. Compl. ¶ 20.

H. Bank of America, N.A. and U.S. Bank, N.A. have misstated the amount owed monthly by the Plaintiffs and have demanded payment of monies in excess of what is owed by the Plaintiffs. Compl. ¶ 78.

**The Rosenthal Act Defines Who is a Debt Collector for Purposes of California Law**

Defendants direct this court to several trial court decisions for the proposition that a creditor or loan servicer cannot be a debt collector under the Rosenthal Act. The first cited decision is *Caballero v. Ocwen Loan Servicing*.<sup>28</sup> In this unreported decision, that court addressed a claim arising under the FDCPA, not the Rosenthal Act.<sup>29</sup>

The second cited decision is *Glover v. Fremont Investment and Loan*.<sup>30</sup> In *Glover*, the trial court summarily dismissed the Rosenthal Act claim based upon the holding in *Caballero*, without discussion of the statutory definition of a debt collector under the Rosenthal Act. Rather, the decision cites *Caballero*, an FDCPA case, as the authority for the proposition now asserted by Defendants that a creditor or servicing agent for a debt secured by real estate is not a debt collector under the Rosenthal Act.<sup>31</sup>

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<sup>28</sup> 2009 U.S. Dist. LEXIS 45213 (N.D. Cal. 2009).

<sup>29</sup> *Id.* at \*1.

<sup>30</sup> 2009 U.S. Dist. LEXIS 117890 (N.D. Cal. 2009).

<sup>31</sup> *Id.* at \*24-\*25. The Rosenthal Act and FDCPA claims was dismissed because the complaint in that case merely stated "Plaintiff alleges that 'BANK 2 violated the Act in one or more of the following ways' and then lists the requirements of the statute...These claims fail for an additional reason: Deutsche is not a 'debt collector' within the meaning of the debt collection statutes. Rather, Plaintiff

1 This court acknowledges that some trial courts have  
 2 interpreted the Rosenthal Act in a manner that mortgage service  
 3 companies, taking actions to obtain payment for the original  
 4 creditor or the assignee of the original creditor, are not "debt  
 5 collectors" as defined under the FDCPA and Rosenthal Act because  
 6 the activities are related to the ultimate foreclosure on real  
 7 property securing the debt. In its extensive Reply Brief,  
 8 Defendants cite a series of mostly unreported decisions from  
 9 several district courts. Though withholding these citations until  
 10 filing its reply brief (ensuring that Plaintiffs could not address  
 11 in writing the numerous newly cited decisions), the court has  
 12 reviewed these mostly unreported additional decisions upon which  
 13 Defendants rely: *Patacsil v. Wilshire Credit Corporation*;<sup>32</sup> *Pittman*  
 14 *v. Barclays Capital Real Estate, Inc.*;<sup>33</sup> *Pok v. American Home*  
 15 *Mortgage Servicing, Inc.*;<sup>34</sup> *Gallegos v. Recontrust Co.*;<sup>35</sup> *Fuentes v.*  
 16 *Deutsche Bank*;<sup>36</sup> *Padayachi v. Indymac Bank*;<sup>37</sup> *Sipe v. Countrywide*

17  
 18  
 19 alleges that Deutsche was the loan servicer. Compl. ¶ 19. Therefore,  
 20 amendment of these claims against Deutsche would be futile. See e.g.,  
 21 *Caballero v. Ocwen Loan Serv.*, 2009 U.S. Dist. LEXIS 45213, 2009 WL  
 22 1528128 \*1 (N.D. Cal. 2009) ('creditors, mortgagors and mortgage  
 servicing companies are not 'debt collectors' and are exempt from  
 liability under the [FDCPA]. . . Defendant Ocwen is a 'loan servicer.'  
 Therefore it is not a 'debt collector' and no claim can be stated  
 against it under the FDCPA.') " *Id.*

23 <sup>32</sup> 2010 U.S. Dist. LEXIS 10414, at \*8-9 (E.D. Cal. Feb. 5 2010).

24 <sup>33</sup> 2009 U.S. Dist. LEXIS 34885, at \*3 (S.D. Cal. Apr. 24, 2009).

25 <sup>34</sup> 2010 U.S. Dist. LEXIS 9016, at \*7-8 (E.D. Cal. Feb. 2, 2010)

26 <sup>35</sup> 2009 U.S. Dist. LEXIS 6365, at \*3 (S.D. Cal. Jan. 29, 2009)

27 <sup>36</sup> 2009 U.S. Dist. LEXIS 57931, at \*3 (S.D. Cal. July 8, 2009)

28 <sup>37</sup> 2010 U.S. Dist. LEXIS 46115, at \*6 (N.D. Cal. April 7, 2010)

1 *Bank*; <sup>38</sup> *Pontiflet-Moore v. GMAC Mortgage*; <sup>39</sup> and *Rosal v. First*  
2 *Federal Bank of California*.<sup>40</sup>

3 A common thread running through these decisions is the  
4 conclusion that a debt secured by a deed of trust cannot be subject  
5 to the Rosenthal Act, and therefore any collection activities to  
6 obtain payment on that secured debt are not subject to the  
7 Rosenthal Act. Many of the cases relied on by Defendants cite to  
8 *Ines v. Countrywide Home Loans, Inc.*,<sup>41</sup> as the seminal case for this  
9 proposition. The court in *Ines* came to the conclusion that since  
10 foreclosing on real property is not the collection of a debt under  
11 the FDCPA, then it would similarly not be a debt under the  
12 Rosenthal Act because some provisions of the FDCPA have been  
13 incorporated into the Rosenthal Act. As discussed herein, the  
14 incorporation of several FDCPA provisions into the Rosenthal Act  
15 does not amend the California definition of debt collector under  
16 the Rosenthal Act and replace it with the more limited definition  
17 under the FDCPA.

18 The court also notes that Defendants' proposition that a debt  
19 is not subject to the FDCPA if it is secured by real or personal  
20 property, and therefore neither should the collection of such debts  
21 be subject to the Rosenthal Act, is not universally accepted.  
22 Contrary decisions not supporting the Defendants arguments, which  
23 were not cited to or addressed by Defendants in their original  
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25 <sup>38</sup> 2010 U.S. Dist. LEXIS 70320, at \*46-\*47 (E.D. Cal. July 13,  
26 2010)

27 <sup>39</sup> 2010 U.S. Dist. LEXIS 11043, at \*6 (E.D. Cal. Jan. 15, 2010)

28 <sup>40</sup> 671 F. Supp. 2d 1111, 1135 (N.D. Cal. 2009)

<sup>41</sup> 2008 U.S. Dist. LEXIS 88739 at \* 3 (S.D. Cal. Nov. 3, 2008).



1 Memorandum of Points and Authorities or the extensive Reply Brief,  
2 include both Circuit Court of Appeals and District Court decisions.  
3 One example is *Wilson v. Draper & Goldberg, P.L.L.C.*,<sup>42</sup> in which the  
4 Court of Appeals concluded that the debt secured by a deed of trust  
5 continued to be subject to the FDCPA even after the foreclosure was  
6 commenced.

7       We disagree. Wilson's "debt" [secured by a deed of  
8 trust] remained a "debt" even after foreclosure  
9 proceedings commenced. See *Piper v. Portnoff Law*  
10 *Assocs.*, 396 F.3d 227, 234 (3d Cir. 2005) ("The fact that  
11 the [Pennsylvania Municipal Claims and Tax Liens Act]  
12 provided a lien to secure the Pipers' debt does not  
13 change its character as a debt or turn PLA's  
14 communications to the Pipers into something other than an  
15 effort to collect that debt."). Furthermore, Defendants'  
actions surrounding the foreclosure proceeding were  
attempts to collect that debt. See *Romea v. Heiberger &*  
*Assocs.*, 163 F.3d 111, 116 (2d Cir. 1998) (concluding  
that an eviction notice required by statute could also be  
an attempt to collect a debt); *Shapiro & Meinhold v.*  
*Zartman*, 823 P.2d 120, 124 (Colo. 1992) ("[A] foreclosure  
is a method of collecting a debt by acquiring and selling  
secured property to satisfy a debt.").

16       Defendants' argument, if accepted, would create an  
17 enormous loophole in the Act immunizing any debt from  
18 coverage if that debt happened to be secured by a real  
19 property interest and foreclosure proceedings were used  
20 to collect the debt. We see no reason to make an  
21 exception to the Act when the debt collector uses  
22 foreclosure instead of other methods. See *Piper*, 396 F.3d  
at 236 ("We agree with the District Court that if a  
collector were able to avoid liability under the [Act]  
simply by choosing to proceed *in rem* rather than *in*  
*personam*, it would undermine the purpose of the  
[Act].") (internal quotation marks omitted).<sup>43</sup>

23       Other cases rejecting a non-statutory exemption from the FDCPA  
24 or Rosenthal Act because the debt is secured by real or personal  
25  
26

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27       <sup>42</sup> 443 F.3d 373 (4th Cir. 2006).

28       <sup>43</sup> *Id.* at 376.



1 property include: *Glazer v. Chase Home Finance LLC*,<sup>44</sup> (finding a  
2 home loan is a debt subject to the FDCPA, which governs the conduct  
3 of debt collectors for both secured and unsecured debts); *Reese v.*  
4 *Ellis, Painter, Ratteree & Adams, LLP*,<sup>45</sup> (finding a promissory note  
5 secured by a mortgage is a debt subject to the FDCPA); *Vargas v.*  
6 *HSBC Bank USA, N.A.*,<sup>46</sup> (finding the FDCPA covers foreclosure-related  
7 debt collection activities); *McGrew v. Countrywide Home Loans,*  
8 *Inc.*,<sup>47</sup> (stating "[i]t is plain that the California legislature  
9 understands the Rosenthal Act may apply to foreclosure  
10 proceedings...the omission of the lenders and servicers from Cal.  
11 Civ. Code § 2924(b) means that such actors may be held liable for  
12 any unlawful debt collection activities during foreclosure.");  
13 *Castrillo v. American Home Mortgage Servicing, Inc.*,<sup>48</sup> (finding a  
14 debt collector is not immunized from liability for violating the  
15 FDCPA merely because the debt is secured by a deed of trust and the  
16 collector is proceeding with a foreclosure sale); and *Kojetin v.*  
17 *C U Recovery, Inc.*,<sup>49</sup> (finding a promissory note secured by a  
18 vehicle is a debt subject to the FDCPA).

19 These reported decisions cast doubt on the basic premise  
20 underlying the unreported decisions relied on by the Defendants  
21 that "a debt is not subject to the FDCPA if it is secured by a  
22

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23 <sup>44</sup> 704 F.3d 453, 460 (6th Cir. 2013).

24 <sup>45</sup> 678 F.3d 1211, 1216-1217 (11th Cir. 2012).

25 <sup>46</sup> 2012 U.S. Dist. LEXIS 128661, at \*16 (S.D. Cal. 2012).

26 <sup>47</sup> 628 F. Supp. 1237, 1243 (S.D. Cal. 2009).

27 <sup>48</sup> 670 F. Supp. 2d 516, 523-24 (E.D. La. 2009).

28 <sup>49</sup> 212 F.3d 1318 (8th Cir. 2000).

1 mortgage or deed of trust, therefore it could not be covered by the  
2 Rosenthal Act."

### 3 ANALYSIS AND STATUTORY CONSTRUCTION OF THE ROSENTHAL ACT

4 The court's analysis begins with the plain language of the  
5 Rosenthal Act itself. It is incumbent on this court to interpret  
6 and apply state law as would the California Supreme Court.<sup>50</sup> The  
7 rules of statutory construction utilized by the California Supreme  
8 Court are essentially the same as used by the courts for  
9 interpreting federal law. To determine the intent of the statute  
10 or ordinance, the court first looks to the plain language and  
11 ordinary meaning of the words used. The words are read in context  
12 of the statute, considering the nature and purpose of the  
13 enactment. If the language is clear, then no further  
14 interpretation of the statute is necessary. If the language is  
15 ambiguous, then the court considers extrinsic evidence, which  
16 includes the legislative history, public policy, and the statutory  
17 scheme of which the statute is a part.<sup>51</sup> Finally, if after  
18 reviewing the plain language and extrinsic aids the meaning of the  
19 statute remains unclear, the court, proceeding cautiously, applies  
20 reason, practicality, and common sense to the statute.<sup>52</sup>

### 21 Basic Statutory Definitions Under the Rosenthal Act

22 The California Legislature defines who is a "debt collector"  
23 for purposes of California law in the Rosenthal Act, as follows,  
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25 <sup>50</sup> *Aetna Cas. & Sur. Co. v. Sheft*, 989 F.2d 1105, 1108 (9th Cir.  
1993).

26 <sup>51</sup> *Professional Engineers in California Government v. Kempton*, 40  
27 Cal. 4th 1016, 1037 (2007).

28 <sup>52</sup> *Woodland Park v. City of East Palo Alto Rent Stabilization  
Board*, 181 Cal. App. 4th 915, 920 (2010).

1 The term "debt collector" means any person who, in the  
 2 ordinary course of business, regularly, on behalf of  
 3 himself or herself or others, engages in debt collection.  
 4 The term includes any person who composes and sells, or  
 5 offers to compose and sell, forms, letters, and other  
 6 collection media used or intended to be used for debt  
 7 collection, but does not include an attorney or counselor  
 8 at law.<sup>53</sup>

9 California law defines "debt collection," to be "any act or  
 10 practice in connection with the collection of consumer debts."<sup>54</sup>

11 A consumer debt is statutorily defined to be "money, property or  
 12 their equivalent, due or owing or alleged to be due or owing from  
 13 a natural person by reason of a consumer credit transaction."<sup>55</sup>

14 Finally, a "consumer credit transaction" is statutorily defined to  
 15 be "a transaction between a natural person and another person in  
 16 which property, services or money is acquired on credit by that  
 17 natural person from such other person primarily for personal,  
 18 family, or household purposes."<sup>56</sup>

19 This is a very broad definition requiring only,

- 20 a. That a person (natural or fictitious, § 1788.2(g)),
- 21 b. In the ordinary course of his, her, or its business,
- 22 c. On behalf of him/her/itself or others,
- 23 d. Engage in any act or practice in connection with the  
 24 collection of,
- 25 e. Money, property or their equivalent, due or owing  
 26 relating to,
- 27 f. A transaction between a natural person and another  
 28 person,

---

25 <sup>53</sup> Cal. Civ. Code § 1788.2(c).

26 <sup>54</sup> *Id.* § 1788.2(b).

27 <sup>55</sup> *Id.* § 1788.2(f).

28 <sup>56</sup> *Id.* § 1788.2(e).

- 1 g. For property, services or money is acquired on credit by  
2 that natural person from such other person, and  
3 h. Was primarily for personal, family, or household purposes  
4 of the natural person.

5 Nothing in the statutory definition excludes a consumer debt  
6 from the Rosenthal Act merely because it is secured by real or  
7 personal property. Further, nothing in the statutory definition  
8 excludes a person from the Rosenthal Act merely because he, she, or  
9 it is attempting to collect a consumer debt that is for a  
10 transaction that he, she or it entered into with the consumer. By  
11 its plain language, the term "debt collector" as used in the  
12 Rosenthal Act includes a creditor who is attempting to collect any  
13 consumer debt owed to that creditor.<sup>57</sup>

14 In 1999 the California Legislature grafted several FDCPA  
15 provisions onto the Rosenthal Act. California Code of Civil  
16 Procedure § 1788.17 provides,

17 Notwithstanding any other provision of this title, every  
18 debt collector collecting or attempting to collect a  
19 consumer debt shall comply with the provisions of  
20 Sections 1692b to 1692j, inclusive, of, and shall be  
21 subject to the remedies in Section 1692k of, Title 15 of  
22 the United States Code. However, subsection (11) of  
23  
24

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25 <sup>57</sup> The widely used California Practice Guide, *Enforcement of*  
26 *Judgments and Debts*, also states, "**Creditors included:** Thus, the state  
27 FDCPA [Rosenthal Act] applies both to *third party debt collectors*  
28 (e.g. collection agencies) and to *creditors* who regularly collect  
consumer debts." California Practice Guide, *Enforcement of Judgments*  
and Debts ¶ 2:127 (Judge Alan M. Ahart, The Rutter Group 2012, Rev. #  
1 2011 (emphasis in original)).

1 Section 1692e<sup>58</sup> and Section 1692g<sup>59</sup> shall not apply to any  
2 person specified in paragraphs (A) and (B) of subsection  
3 (6) of Section 1692a of Title 15 of the United States  
4 Code or that person's principal. The references to  
federal codes in this section refer to those codes as  
they read January 1, 2001.

5 The California Legislature carefully excluded a limited  
6 subclass of Rosenthal Act statutorily defined debt collectors from  
7 only two of the state law obligations arising under grafted on  
8 15 U.S.C. § 1692e(11) (initial disclosure, commonly called the  
9 Mini-Miranda, to be given in the first collection communication  
10 with the consumer debtor) and § 1692g (requirement to validate the  
11 debt if consumer requests in writing within 30 days of the initial  
12 collection communication). However, all of the other grafted FDCPA  
13 provisions apply in full force and effect for all Rosenthal Act  
14 defined debt collectors.

15 The subclass of Rosenthal Act defined debt collectors given an  
16

17 <sup>58</sup> 15 U.S.C. 1692e(11) requires that the FDCPA debt collector  
18 provide the Mini-Miranda, a disclosure in the initial written  
19 communication, and initial oral communication if it precedes the  
initial written communication, with the debtor that the communication  
is from a debt collector and that it is an attempt to collect a debt.

20 <sup>59</sup> 15 U.S.C. § 1692g requires that the initial written  
21 communication disclose to the debtor (1) the amount of the debt,  
22 (2) the name of the creditor to whom the debt is owed, (3) a statement  
23 if the debtor does not dispute the debt in writing within 30 days the  
24 debt collector will assume the debt is valid, (4) that if the debt is  
25 disputed in the 30-day period the debt collector will obtain  
verification of the debt from the creditor, and (5) that upon written  
request within the 30-day period the debt collector will provide the  
debtor with the name and address of the original creditor, if  
different from the current creditor for whom the debt is being  
collected.

26 A statutory exception is provided in 1692(g)(e) that forms and  
27 notices not relating to the collection of the debt and required by the  
28 Internal Revenue Code (26 USCS §§ 1 et seq.), title V of  
Gramm-Leach-Bliley Act (15 USCS §§ 6801 et seq.), or federal or state  
law relating to notice of data security breach or privacy are not  
treated as a "communication" under the FDCPA.

1 exemption from these two provisions are (1) "any officer or  
2 employee of a creditor while, in the name of the creditor,  
3 collecting debts for such creditor;" or (2) "any person while  
4 acting as a debt collector for another person, both of whom are  
5 related by common ownership or affiliated by corporate control, if  
6 the person acting as a debt collector does so only for persons to  
7 whom it is so related or affiliated and if the principal business  
8 of such person is not the collection of debts;...."<sup>60</sup> Clearly, the  
9 only reason that such exceptions were required to be created by the  
10 California Legislature to the definition of a Rosenthal Act debt  
11 collector can be that without them, officers or employees of the  
12 creditor, the creditor, and a creditor owned and controlled  
13 collection agency subsidiary, are otherwise within the broad  
14 Rosenthal Act definition of a debt collector.

15 In considering the Defendants' argument and the authorities it  
16 has cited, it is critical to understand that the FDCPA statutory  
17 definition of a debt collector differs significantly from the  
18 California state law definition of a debt collector under the  
19 Rosenthal Act. Under the FDCPA a debt collector is defined to be,

20 **[a]ny person who** uses any instrumentality of interstate  
21 commerce or the mails in any business the principal  
22 purpose of which is the collection of any debts, or who  
23 **regularly collects** or attempts to collect, directly or  
24 indirectly, **debts owed or due or asserted to be owed or**  
25 **due another.** Notwithstanding the exclusion provided by  
26 clause (F) of the last sentence of this paragraph, the  
27 **term includes any creditor who,** in the process of  
28 collecting his own debts, **uses any name other than his**  
**own which would indicate that a third person is**  
**collecting or attempting to collect such debts.** For the  
purpose of section 808(6) [15 UCS § 1692f(6)], such term  
also includes any person who uses any instrumentality of  
interstate commerce or the mails in any business the

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<sup>60</sup> 15 U.S.C. 1692a(6) (A), (B).

1 principal purpose of which is the enforcement of security  
2 interests....<sup>61</sup>

3 First, with the limited exception of a creditor using an alias to  
4 make it appear that a third-party is involved, the FDCPA defined  
5 debt collector is limited to a person attempting to obtain payment  
6 on an obligation which was originally owed to another person.  
7 Commonly an FDCPA covered debt collector is called a "third-party  
8 debt collector." (The original creditor and debtor being the first  
9 two parties to the transaction.)

10 In grafting the FDCPA onto state law, the California  
11 Legislature recognized this difference, creating the limited  
12 exceptions for the Mini-Miranda and validation notice requirements  
13 for creditors who are debt collectors under the Rosenthal Act.  
14 However, the basic provisions of the Rosenthal Act that a person  
15 shall not lie, cheat, steal, threaten, or abuse a consumer in  
16 attempting to obtaining payment on a consumer debt do not interfere  
17 with the good faith collection of the consumer debt - whether it be  
18 secured or unsecured. To the extent that state law provides a  
19 procedure for obtaining payment on the debt, such as a statutory  
20 non-judicial foreclosure process, the California Legislature has  
21 provided the creditor, third-party debt collector, servicing  
22 agency, and consumer with clear benchmarks by which the collection  
23 activities can be measured. There is nothing inconsistent with the  
24 requirements of the Rosenthal Act and it being applied to a  
25 creditor with a secured claim.

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26  
27  
28 <sup>61</sup> 15 U.S.C. § 1692a(6) (emphasis added).

1 **State Law Provides an Express Exemption From The**  
2 **Rosenthal Act Only For The Trustee Under a Deed of Trust**

3 Defendants' argument that there needs to be a non-statutory,  
4 implied exemption from the Rosenthal Act for a consumer debt  
5 secured by a deed of trust is belied by the fact that the  
6 California Legislature has already expressly addressed the issue.  
7 California Civil Code § 2924(b) provides a statutory exemption from  
8 the Rosenthal Act for a trustee under a deed of trust as follows,

9 In performing acts required by this article, the trustee  
10 shall incur no liability for any good faith error  
11 resulting from reliance on information provided in good  
12 faith by the beneficiary regarding the nature and the  
13 amount of the default under the secured obligation, deed  
14 of trust, or mortgage. **In performing the acts required by**  
15 **this article, a trustee shall not be subject to Title**  
16 **1.6c (commencing with Section 1788) of Part 4.**<sup>62</sup>

17 The California Legislature has carefully constructed the exemption  
18 to apply only (1) to the trustee under a deed of trust and (2) only  
19 to that trustee performing the acts required under Article 1,  
20 Mortgages in General, of Chapter 2, Mortgages, of Title 14 of the  
21 California Civil Code, Lien. In enacting this exemption from the  
22 Rosenthal Act, the California Legislature has clearly limited to  
23 the acts of a trustee exercising the powers under a deed of trust.  
24 The California Legislature has not created, or intended to create  
25 an implied, free ranging exemption by which a trustee under a deed  
26 of trust (and thereby the creditor owed the consumer debt) becomes  
27 an unregulated debt collector for any and all purposes.

28 If Defendants were correct that the Rosenthal Act did not  
apply to debts which were secured by real property or for which

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<sup>62</sup> Cal. Civ. Code § 2924(b) (emphasis added).



1 foreclosure proceedings could be commenced or were being  
2 prosecuted, then no legislative reason would have existed for  
3 enacting California Civil Code § 2924(b).

4 **Legislative History of the Rosenthal Act<sup>63</sup>**

5       Given the dearth of statutory analysis presented to the court  
6 by the parties, in addition to the plain language of the statute  
7 the court has reviewed the legislative history available from the  
8 California State Archives maintained by the California Secretary of  
9 State. California Senate Bill 237, 1977, is the legislation by  
10 which the Rosenthal Act (formerly known as the Robbins-Rosenthal  
11 Fair Debt Collection Practices Act) was enacted. It is clear from  
12 the legislative history that the plain language of the statute  
13 means what it says - all debt collectors, whether original  
14 creditors, agents of original creditors, or third-party collection  
15 agencies, for all consumer credit transaction debts, whether  
16 secured or unsecured, are covered by the Rosenthal Act.

17       The Assembly Judiciary Committee Analysis issued for the  
18 August 11, 1977 hearing on for SB 237, states,

19       This measure governs all debt collection practices  
20 arising from the extension of credit if the credit was  
21 obtained primarily for personal, family, or household  
22 purposes. **Regulated debt collectors include any person**  
23 **who, in the ordinary course of business, on behalf of**  
24 **himself or others, engages in debt collection** and any  
25 person who composes and sells forms, letters, and other  
26 collection media used for debt collection. Debt  
27 collectors currently licensed by the Bureau of  
28 Collections and Investigations [traditional third-party  
collection agencies] would be subject to regulation by

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26       <sup>63</sup> The legislative history documents are filed in this Adversary  
27 Proceeding as a separate addendum to this Memorandum Opinion and  
28 Decision, set as the next docket entry in order. This addendum may be  
reviewed using PACER access to the court's public records or at the  
courthouse itself.

1 this measure. Attorneys are specifically exempted.<sup>64</sup>

2 After SB 237 was passed by the Legislature, the California  
3 Department of Consumer Affairs issued its Enrolled Bill Report to  
4 then Governor Edmund G. Brown, Jr., stating,

5 The collection practices of collection agencies licensed  
6 by the Bureau of Collection and Investigative Services  
7 [traditional third-party collection agencies] are  
8 regulated by the Bureau. Licensed collection agencies  
9 are responsible for about 10% of the debt collection in  
10 California. The other 90% is performed by in-house  
11 collectors (for banks, retailers, finance companies, and  
12 so on.)...

13 The Robbins-Rosenthal Fair Debt Collection Practices Act  
14 [renamed the Rosenthal Act in AB 969, 1999] would be a  
15 **comprehensive act governing the debt collection practices**  
16 **of all person who in the ordinary course of business on**  
17 **behalf of themselves** or others engage in the collection  
18 of consumer debts. The Act would thus **apply to debt**  
19 **collectors licensed by the Bureau of Collection and**  
20 **Investigative Services (CIS) and to in-house collectors**  
21 (such as bankers, credit unions, savings and loans,  
22 personal property brokers, industrial loan companies, and  
23 retailers)...

24 ...

#### 25 A. SPECIFIC FINDINGS

26 The Robbins-Rosenthal Fair Debt Collection Practices Act  
27 would be a comprehensive act governing the debt  
28 collection practices of **all persons who in the ordinary**  
course of business on behalf of themselves or others  
engage in the collection of consumer debts. The Act would  
thus apply to debt collectors licensed by the Bureau of  
Collection and Investigative Services (CIS) and to  
in-house collectors (such as bankers, credit unions,  
savings and loans, personal property brokers, industrial  
loan companies, and retailers)...

#### 29 D . RECOMMENDATION : Sign

30 The Department of Consumer Affairs worked with Senator  
31 Robbins on the August amendments and we are satisfied  
32 that this amended bill would constitute a significant  
33 improvement in consumer protection against unfair debt

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34 <sup>64</sup> Fair Debt Collection Practices Act Bill Digest: Hearing on  
35 California SB 237 Before the Assembly Comm. on Judiciary, August 11,  
36 1977 (emphasis added).

1 collection practices. While the bill's provisions are in  
 2 some cases less strict than the new regulations governing  
 3 the collection agencies licensed by the Bureau of  
 4 Collection and Investigative Services, **we believe that**  
 5 **the bill's impact on the presently unregulated collection**  
 6 **practices of in-house collectors - whose activities make**  
 7 **up more than 90% of debt collection --** would represent a  
 8 positive gain for consumers.<sup>65</sup>

9 The Rosenthal Act was enacted specifically to make the  
 10 creditor, not merely the third-party collection agency, subject to  
 11 the California debt collection laws. This is consistent with the  
 12 plain language of the statute defining debt collector expansively,  
 13 so as to address the 90 percent of the otherwise unregulated  
 14 creditor debt collection activities.

15 The court has also reviewed the legislative history for the  
 16 1999 amendments to the Rosenthal Act, AB 969, by which specific  
 17 provisions of the FDCPA were made part of state law. The Senate  
 18 Rules Committee Report, issued for the Third Reading of AB 969 on  
 19 the Senate Floor, states,

20 This bill provides that **every debt collector collecting**  
 21 **or attempting to collect a consumer debt shall comply**  
 22 **with the provisions of Sections 1692b to 1692j,**  
 23 **inclusive, of Title 15 of the United States Code.** These  
 24 sections provide, among other provisions, that a  
 25 collector may not harass, oppress, or abuse a debtor, nor  
 26 use obscene language. Third parties may only be  
 27 contacted with the debtor's permission.

28 ...

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29 <sup>65</sup> California Department of Consumer Affairs, Enrolled Bill  
 30 Report for SB 237, September 15, 1977 (emphasis added). See also  
 31 California Department of Finance, Enrolled Bill Report for SB 237,  
 32 September 15, 1977, stating,

33 This bill would substantially expand the coverage of debt  
 34 collection law. Under existing law, only the debt  
 35 collection practices of licensed collection agencies are  
 36 regulated. This bill would increase the coverage of such  
 37 law as to include in-house debt collectors such as banks and  
 38 retailers (approximately 90 percent of the debt collectors  
 39 in the State).

1 This dual scheme of regulation [FDCPA and Rosenthal Act]  
 2 can sometimes become confusing, rendering state law  
 3 unused. The sponsor argues this bill is needed in order  
 4 to establish clear lines of acceptable behavior, pointing  
 5 out that other states, such as Pennsylvania and  
 6 Massachusetts, have similarly incorporated federal  
 provisions to harmonize state and federal law. The  
 [California Attorney General] adds that, "**consistent  
 federal and state standards** would facilitate compliance  
 and enforcement and **provide a level playing field for all  
 engaged in debt collection activity.**"<sup>66</sup>

7 The Senate Judiciary Committee Analysis contains similar  
 8 language that the FDCPA provisions shall apply to all debt  
 9 collectors (with the specified two exceptions), and adds the  
 10 further information from the sponsor of AB 969, the California  
 11 Attorney General,

12 The bill's sponsor, the Attorney General, (AG) adds, "the  
 13 Attorney General's office has sponsored AB 969 to  
 14 **harmonize state and federal law by applying federal debt  
 collection standards and remedies to all parties defined  
 as debt collectors under California law.**"<sup>67</sup>

15 Again, with the 1999 amendments the legislative history is  
 16 clear - all provisions of the Rosenthal Act, including the grafted  
 17 on FDCPA provisions (subject to the two express exceptions), shall  
 18 apply to all debt collectors as defined under the Rosenthal Act.  
 19 There is no evidence of any non-statutory intent or belief that an  
 20 unstated general exception was created using the federal definition  
 21 of debt collector to change the definition in the Rosenthal Act.

22  
 23 **COMPLAINT SUFFICIENTLY ALLEGES THAT DEFENDANTS ARE  
 DEBT COLLECTORS SUBJECT TO THE ROSENTHAL ACT**

24 While leaving a little bit to be desired, in the context of

25  
 26 <sup>66</sup> California Senate Rules Committee, Senate Floor Analysis for  
 AB 969, July 23, 1999 (emphasis added).

27  
 28 <sup>67</sup> Hearing on AB 969 Before the California Senate Judiciary  
 Committee, 1999-2000 Regular Session, July 7, 1999 (emphasis added).

1 Defendants' contention that a creditor with a claim secured by a  
2 deed of trust is not a "debt collector" as statutorily defined by  
3 the Rosenthal Act, Plaintiffs have sufficiently alleged that  
4 Defendants are debt collectors to survive this Motion to Dismiss.  
5 The Motion does not state with particularity the grounds by which  
6 the legal conclusion is asserted that "Plaintiffs fail to properly  
7 allege that Defendants are debt collectors as defined under the  
8 Rosenthal Fair Debt Collection Practices Act (California Civil Code  
9 1788)." Fed. R. Civ. P. 7(b), Fed. R. Bankr. PO. 7007. The Points  
10 and Authorities, to the extent that they constitute the motion,  
11 assert that a creditor and mortgage service company cannot, as a  
12 matter of law, be a debt collector under the Rosenthal Act. As  
13 addressed above, such a contention is erroneous.

14 Here, Plaintiffs are natural persons who are the Chapter 13  
15 debtors. Defendants assert that they are owed a debt which is  
16 secured by the Plaintiffs' residence, 7330 Meadowlark Lane. This  
17 is identified as the Plaintiffs' principal residence in the Notice  
18 of Payment Change filed by the Defendants which is the subject of  
19 the Complaint. No contention has been made that this claim does  
20 not arise from a consumer credit transaction.<sup>68</sup> From the Complaint,  
21 Notice of Payment Change, and Schedules in the bankruptcy case, the  
22 debt being collected is a consumer debt.

23 The only possible missing element is that Defendants in the  
24 ordinary course of business attempt to collect debts covered by the  
25

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26 <sup>68</sup> On the Petition filed in the Plaintiffs' bankruptcy case they  
27 list the subject Property as their Street Address. Petition, Bankr.  
28 E.D. Cal. 11-31221 Dckt. 1. The Petition also states that the  
Plaintiffs' debts are primarily consumer debts as defined under 11  
U.S.C. § 101(8), "primarily for a personal, family, or household  
purpose."

1 Rosenthal Act. The court takes judicial notice that both BANA and  
2 U.S. Bank regularly collects consumer debts from natural persons,  
3 whether they are voluntary payments, judicially enforced payments,  
4 bankruptcy plan payments, non-judicial foreclosures, or through the  
5 exercise of the power to sell personal property under the  
6 California Commercial Code, for obligations which are consumer  
7 debts.<sup>69</sup> There can be little dispute that it is commonly known in  
8 the community, state, and nation that both of these banks regularly  
9 collect their own consumer debts from natural persons, as well as  
10 other debts for trusts or other entities for which they have  
11 accepted such a responsibility (such as the trustee of a mortgage  
12 loan portfolio trust). If either or both of these Defendants  
13 seriously believe that the court's judicial notice is incorrect,  
14 they can address it in a motion for summary judgment or other  
15 appropriate motion based on this limited issue.

16  
17  

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18 <sup>69</sup> Where certain indisputable facts are so within the common and  
19 general knowledge of the community, or capable of accurate and ready  
20 determination by resort to sources whose accuracy cannot reasonably be  
21 questioned, the judicial notice doctrine serves as a substitute for  
22 formal proof. A judicially noticed fact must be one not subject to  
23 reasonable dispute in that it is either (1) generally known within the  
24 territorial jurisdiction of the trial court or (2) capable of accurate  
25 and ready determination by resort to sources whose accuracy cannot  
26 reasonably be questioned. Fed. R. Evid. 201(b). Even where a fact may  
27 not be of common knowledge, so long as the fact is capable of  
28 immediate and accurate determination from a credible source, a court  
may take judicial notice. *Id.* at 201(b)(2).

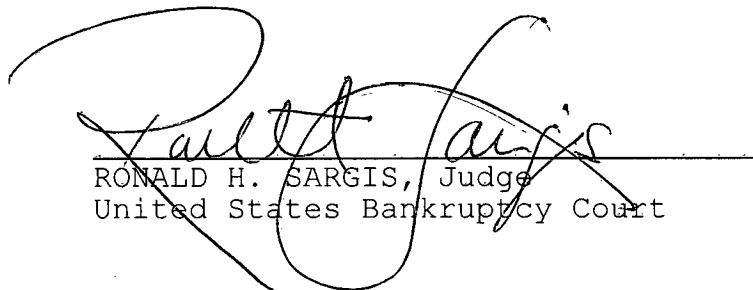
24 No formula exists for determining the appropriate use of judicial  
25 notice under Federal Rule of Evidence 201(b)(2). See 2 MCCORMICK ON EVID.  
26 § 330 (6th ed.). Frequently, courts utilize judicial notice with  
27 regard to information contained in public records. *Mack v. S. Bay*  
28 *Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986), *abrogated in part*  
*on other grounds by Astoria Federal Savings and Loan Ass'n v.*  
*Solimino*, 501 U.S. 104 (1991).





1 Bank of America, N.A. and U.S. Bank, N.A., as Trustee for  
2 Certificate holders of LXS 2007-16N Trust Fund, filed their  
3 respective answers after the oral argument and the court discussed  
4 its ruling on this Motion. Dckt. 30.

5 Dated: May 14, 2013

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8 RONALD H. SARGIS, Judge  
9 United States Bankruptcy Court  
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CERTIFICATE OF MAILING

The undersigned deputy clerk in the office of the United States Bankruptcy Court for the Eastern District of California hereby certifies that the attached document(s) was served by mail to the following entities listed at the address(es) shown below:

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Robert T Matsui United States Courthouse  
501 I Street, Room 7-500  
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Daniel Ruby  
101 2nd St #1800  
San Francisco, CA 94105

DATE:

5.16.13

  
Deputy Clerk